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No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1930

AMERICAN BOND AND MORTGAGE COMPANY AND TRIANON, INC.

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLEE BELOW

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OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is reported in 31 F. (2d) 448.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The Circuit Court of Appeals certified the following questions:

1. Did a corporation which, prior to the enactment of the Radio Act of 1927, applied

for and obtained successive licenses from the Secretary of Commerce authorizing such corporation to broadcast with a specified transmitter, and which acquired and owned the necessary apparatus, the building in which the apparatus was housed, and the land whereon the same was located, and continuously broadcasted therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of broadcasting by such corporation as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

2. Does a corporation, which, subsequent to the enactment of the Radio Act of 1927, expended substantial sums in replacing old apparatus with new after obtaining a construction permit from the Federal Radio Commission, and thereafter used the new apparatus under licenses issued by the Federal Radio Commission and continuously broadcast therewith to an audience interested in its radio programs, have or acquire thereby a property right within the meaning of the word "property" as used in the Fifth Amendment to the Constitution of the United States,

(a) In the continuance of such broadcasting as a business or occupation?

(b) In the continued use of such apparatus, building and land for similar broadcasting purposes?

If by virtue of the answers to questions 1 and/or 2, it appears that such a corporation had or acquired such a property right, the Circuit Court of Appeals asked:

3. Is such a corporation deprived of property without due process of law or without just compensation contrary to the provisions of the Fifth Amendment to the Constitution of the United States by virtue of the waiver required by the joint resolution of Congress of December 8, 1926, or the waiver referred to in the last paragraph of Section 5, or the condition required to be contained in all licenses by subparagraph (a) of Section 11 of the Radio Act of 1927 as amended?

4. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license by said person, to deprive such person of such property without due process of law, in that the only standards provided by the Act for the guidance of the Commission in acting upon such applications are that of "public interest, convenience or necessity" and that set forth in Section 5 of the Amendatory Act of March 28, 1928, and in that the Act fails to require that the Commission, prior to proceeding to a hearing or decision on such application, shall specify in what respect it deems or has failed to find that the

granting of such application would not serve public interest, convenience or necessity, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

5. Is the Act of March 28, 1928, amending the Radio Act of 1927 (commonly known as the Davis Amendment) valid as against the claim that it authorizes or requires the Federal Radio Commission, in acting upon an application for renewal of license, to deprive such person of such property without due process of law or to take private property for public use without just compensation, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

6. Is the Radio Act of 1927, as amended, valid as against the claim that it authorizes or requires the Federal Radio Commission in its action on an application for renewal of license by a person such as is described in question 2 to take property for public use without just compensation, by denying such application, contrary to the provisions of the Fifth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The relevant portion of the Constitution and of the statutes are set forth in the Government's brief in *White* v. *Johnson,* No. 29, on the current docket of this Court, pp. 53–65.

STATEMENT

The certificate of the Circuit Court of Appeals states the facts substantially as follows:

American Bond and Mortgage Company operates an investment service and sells to investors in all parts of the United States bonds, mortgages, and other securities. (P. 6.) Trianon, Inc., operates two large public ballrooms in the City of Chicago, Illinois. (P. 6.) These two corporations (hereinafter sometimes called appellants) are in close financial relation to each other. (P. 3.)

On August 31, 1928, the Federal Radio Commission denied an application for renewal of the license under which the American Bond and Mortgage Company had been operating a radio broadcasting station located at Homewood, Illinois, about twenty-five miles from the City of Chicago. (Pp. 2, 5.) After appellants had announced that they intended to resume operation of this station on a frequency of 1,190 kcs. and with a power of 5,000 watts, the United States brought this action to enjoin such operation. (P. 2.) Appellants appealed from a decree of the United States District Court for the Northern District of Illinois which perpetually enjoined them from operating their station until they should obtain a license issued under the Radio Act of 1927, c. 169, 44 Stat. 1162, authorizing such operation. (P. 1.)

The certificate (pp. 2–5) sets forth the history of the station and the proceedings leading up to the Commission's refusal to renew a license therefor. On April 3, 1925, Trianon, Inc., was licensed by the Secretary of Commerce under the Act to Regulate Radio Communication of August 13, 1912, c. 287, 37 Stat. 302, to operate a radio station of 500 watts power under the call letters WMBB. This license was succeeded on May 5, 1925, by a three months' license entitling the American Bond and Mortgage Company to operate the station with the same power. Thereafter and until February 23, 1927, the date of the enactment of the Radio Act of 1927, successive licenses were issued by the Secretary of Commerce to the American Bond and Mortgage Company, and from that time to September 28, 1927, successive licenses were granted it by the Federal Radio Commission. From May 25, 1925, to June, 1927, these licenses authorized use of the frequency of 1,200 kcs. and thereafter to September 28, 1927, use of the frequency of 1,190 kcs.

In July, 1925, a corporation known as Neutrowound Radio Manufacturing Company obtained from the Secretary of Commerce a license to operate a broadcasting station located at Homewood, Illinois, with a power of 500 watts, under the call letters WOK. This license was succeeded in November, 1925, by one permitting the use of a new transmitter with a power of 5,000 watts. The

latter license was renewed by the Secretary of Commerce until February 23, 1927, and thereafter by the Federal Radio Commission until April 27, 1927. On the latter date Trianon, Inc., acquired the station for a valuable consideration, and the Federal Radio Commission issued to Trianon, Inc., successive licenses to operate the 5,000 watts transmitter until September 28, 1927, with a daily division of time with station WMBB. During the period from April, 1927, to September 28, 1927, the two stations, WMBB and WOK, while they nominally divided time, were to a large extent operated as one station with a continuous broadcasting service.

On August 3, 1927, the Federal Radio Commission issued, pursuant to its finding that public interest, convenience, or necessity would be served thereby, a construction permit to the American Bond and Mortgage Company for the construction of a new transmitter at Homewood. Upon the completion of the construction of the new station the Commission, on Sepember 28, 1927, issued a license to American Bond and Mortgage Company authorizing full-time operation of the station on a frequency of 1,190 kcs. with 5,000 watts power. Upon the expiration of the license the Commission granted a second license, which authorized operation on the same frequency and power for 60 days from November 1, 1927. The latter license was extended from time to time until it finally expired on September 1, 1928.

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In January, 1928, American Bond and Mortgage Company filed an application for a renewal of its license. In May, 1928, the Commission entered General Order 32, which recited that the Commission had examined the license applications of the applicants named therein, including American Bond and Mortgage Company, and that it was not satisfied that public interest, convenience, or necessity would be served by granting these applications, and fixed July 9, 1928, in its offices at Washington, D. C., as the time and place for hearing on each of the applications, 164 in number. The Commission mailed a copy of its order to American Bond and Mortgage Company accompanied by a letter stating, among other things:

> At this hearing unless you can make an affirmative showing that public interest, convenience, or necessity will be served by the granting of your application, it will be finally denied.

On July 9, 1928, appellants appeared before the Commission by counsel, as did a large proportion of the other stations included in the order. The hearing on appellants' application was held partly on July 19, 1928, and partly on July 23, 1928. On August 31, 1928, the Commission took action with reference to appellants' application by rendering the following order:

> The Commission having considered the evidence and the arguments presented to it in the above-entitled case, heretofore heard

> and taken under advisement, and having found that public interest, convenience or necessity would not be served by granting said application,
>
> It is ordered, that said application be, and the same is hereby denied; this order to be effective on September 1, 1928, at the hour of 3 o'clock A. M., Eastern Standard Time.

By General Order 40 of the Federal Radio Commission, adopted August 30, 1928, the frequency of 1,190 kcs. was designated as a cleared channel to be used only by stations having at least 5,000 watts power and by only one station at a time in evening operation. Pursuant to the equalization requirements of Section 5 of the Amendatory Act of March 28, 1928, c. 263, 45 Stat. 373, this channel was assigned by said order to the Third Zone, as established by Section 2 of the Radio Act of 1927. Since November 11, 1928, two Texas broadcasting stations, WRR and WOAI, which had previously operated on other frequencies, have, on a division of time between them, operated exclusively on a frequency of 1,190 kcs. with power of 5,000 watts each. If appellants' station were permitted to operate simultaneously on the frequency used by the Texas stations, only a small area in the vicinity of each station would obtain satisfactory reception of the programs of either the Texas stations or appellants' station. There is no frequency available for United States broadcasting stations on which appellants' station can operate without seriously interfering

with reception of programs from some one or more broadcasting stations now in operation under licenses from the Federal Radio Commission and without very substantially reducing the areas served by such stations with satisfactory reception. (Pp. 6–7.)

Prior to September 1, 1928, appellants had expended on the Homewood transmitter sums aggregating $100,000. The transmitter has a maximum power of 20,000 watts and is of the type used in the operation of a broadcasting station. The market for the transmitter and incidental equipment is so limited that appellants will be unable to realize from its sale more than what would commonly be regarded as its junk value. Appellants have placed certain expensive improvements upon the real estate to house the transmitter; these improvements are particularly adapted for use in connection with the broadcasting station and consequently the real estate can not be sold without a very substantial loss with respect to such improvements. In addition, appellants claim that their broadcasting business included a going value and a good will of its radio audience attaching to the call letters WMBB-WOK, to the frequency of 1,190 kcs. used in broadcasting their programs, and to the programs themselves. It appears that the programs broadcast by appellants consisted mainly of entertainment, chiefly music, and of talks and addresses on various subjects. During the first eight months of 1928 appellants expended a sum in excess of

$23,000 for services of employees exclusively for the operation of their station. While there have been occasional instances when appellants have sold time on their programs to advertisers, the revenue from the sale of such time has been of so small an amount as to be practically negligible. (Pp. 2, 5–6.) Appellants state that—

> Their purpose has at all times been to maintain these stations as a service to the public, and that the only return which they have received or expected to receive, has been from the good will of their patrons and listeners resulting from the high quality of programs which they have broadcast. (P. 6.)

Pursuant to the Joint Resolution of Congress approved December 8, 1926, c. 1, 44 Stat. 917, the American Bond and Mortgage Company filed with the Secretary of Commerce on January 24, 1927, as a part of an application which it was then making for renewal of its license to operate Station WMBB, a signed written waiver of—

> any right or any claim of right as against the United States, to any wave length, or to the use of the ether in radio transmission, because of previous license to use the same or because of the use thereof. (P. 4.)

All applications for license or renewal of license filed by either appellant after February 23, 1927, contained a written waiver by the applicant—

> of any claim to the use of any particular frequency or wave length or of the ether as

> against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise. (P. 4.)

Each license and renewal license issued by the Commission to either appellant contained the following condition:

> This station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein. (P. 4.)

SUMMARY OF ARGUMENT.

I. The operation of appellants' broadcasting stations and appellants' ownership of apparatus used for broadcasting, prior to the enactment of the Radio Act of 1927, created no property right to be free from an exercise of the regulatory power of Congress over interstate commerce. Before Congress had undertaken by that Act to regulate broadcasting, such operation and the use of such property were subject to the control over interstate commerce vested in Congress by the Constitution and could not give rise to a property right free of such control. The doctrine of prior appropriation upon which the alleged property right is grounded is limited to a determination of superior right between private claimants and does not confer a prescriptive right against a proper exercise

of governmental power. The doctrine, moreover, is not applicable to radio broadcasting.

Apart from these considerations, the right to broadcast with a station using 5,000-watts power, which appellants assert, was not acquired by them prior to the enactment of the Radio Act of 1927, and appellants have no apparatus which they used for broadcasting prior to such enactment.

II. Replacing old apparatus with new pursuant to a construction permit issued under the Radio Act of 1927 and use of the new equipment under licenses issued under that Act did not create a property right to disregard its licensing provisions. The Act is explicit that the granting of a construction permit or operating license creates no such right. The alleged right can not arise if these provisions are constitutional, but appellants are in no position to assert that the Act is unconstitutional. They can not base a property right on authorizations obtained under the Act and at the same time attack its constitutionality.

III. Any loss to appellants caused by the Federal Radio Commission's refusal, pursuant to the regulatory provisions of the Radio Act of 1927, to renew the license for their station was an injury incidentally resulting from a legitimate exercise of governmental power and was not a taking of property for the public use. Power in the Commission to establish cleared channels pursuant to the equalization requirements of Section 9 of the Radio Act

of 1927 and Section 5 of the Amendatory Act of March 28, 1928, and for this purpose to deny to a station a renewal of its license is reasonably necessary and appropriate to regulation of broadcasting in the public interest.

The provisions of Section 9 of the Act, as amended by the Act of March 28, 1928, are not so arbitrary and unreasonable as to amount to want of due process. This section authorizes the Commission, in granting or refusing licenses for broadcasting, to allocate frequencies and power to the five zones into which the United States is divided by the Act so as to give to each zone equal broadcasting service. Equality of service is a fundamental principle of public utility regulation and it is reasonable to extend this principle to broadcasting. Equality in broadcasting service requires an approximately equal distribution of broadcasting stations throughout the different sections of the country. There was therefore no want of due process when the Commission determined that a frequency previously used by a high-powered station outside of the third zone should be assigned to stations in that zone and when it selected the frequency of appellants' station for such assignment.

IV. The Radio Act of 1927 is not wanting in due process because of indefiniteness in the statutory standard of public interest, convenience, or necessity or because the Act did not require the Commission further to define the issues in advance of a

hearing before it. This question is precisely the same as one of the questions presented in *White* v. *Johnson*, No. 29 on the current docket of this Court, and reference is made to the argument on this point in the Government's brief filed with the Court in *White* v. *Johnson*.

ARGUMENT

I

OPERATION OF APPELLANTS' BROADCASTING STATIONS AND OWNERSHIP OF APPARATUS, BUILDING, AND LAND USED FOR BROADCASTING PURPOSES, PRIOR TO THE ENACTMENT OF THE RADIO ACT OF 1927, CREATED NO PROPERTY RIGHT TO BE FREE FROM AN EXERCISE OF THE REGULATORY POWER OF CONGRESS OVER INTERSTATE COMMERCE

The first question certified by the Circuit Court of Appeals is whether the operation of a broadcasting station and the acquisition of apparatus, building, and land for broadcasting purposes, prior to the enactment of the Radio Act of 1927, creates a property right within the meaning of the word "property" as used in the Fifth Amendment (a) to continue broadcasting or (b) to continue the use of such apparatus, building, and land for broadcasting purposes.

We submit that this question, so far as it relates to the existence of a right to continue broadcasting arising out of broadcasting operations before the passage of the Radio Act of 1927, is answered in the Government's brief filed with this Court in

White v. *Johnson,* No. 29, on the current docket of the Court. The argument there advanced was: (1) The operation of a broadcasting station is at all times subject to the regulatory power of Congress over interstate commerce and therefore operation of such a station prior to the enactment of the Radio Act of 1927 does not create a property right to be thereafter free from an exercise of such regulatory power. (Gov. brief in No. 29, pp. 13–21.) (2) The doctrine of prior appropriation upon which the alleged property right is based is limited to a determination of superior right between private claimants and does not confer a prescriptive right against a proper exercise of governmental power. (*Ibid,* pp. 21–24.) (3) The doctrine of prior appropriation is not applicable to radio broadcasting. (*Ibid,* pp. 24–29.)

Apart from these objections to a property right based on operation of broadcasting stations before Congress undertook any comprehensive regulation of radio communication, we submit that the facts in this case do not support the right which appellants assert. This suit was brought to enjoin appellants from carrying out their announced intention to broadcast with 5,000 watts power. (*Supra,* p. 5.) A right to broadcast with this power can not be based on the operations of station WMBB, which never used more than 500 watts power. Station WOK, on the other hand, was not owned by appellants prior to the enactment of the Radio Act of 1927 on February 23, 1927. (*Supra,* pp. 6–7.)

The good will of patrons and listeners, for which appellants have operated and desire to operate their station (*supra,* p. 11) had not attached at this date. Since appellants' business of broadcasting with a station using 5,000 watts power began after the enactment of the Radio Act of 1927, the facts do not establish the necessary premise for applying the alleged rule (Appellants' brief, pp. 25–28) that the right to continue an established business is property.

We submit that the other part of the question certified, whether a prior use of apparatus and land for broadcasting purposes creates a property right to continue such use, is merely stating the issue in another way. Probably every business requires the use of property. If one can not, by engaging in interstate commerce before Congress has acted, obtain immunity from future Congressional regulation, surely such a right can not be obtained by attaching to the property used in interstate commerce a right to be continued in the same use free from such regulation. Land under navigable water used for many years for the production of oysters does not have attached to it a right to be continued in such use when this would interfere with an improvement in navigation. See *Lewis Blue Point Oyster Co.* v. *Briggs,* 229 U. S. 82. See also *Louisville Bridge Co.* v. *United States,* 242 U. S. 409; *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *Morris* v. *Duby,* 274 U. S. 135.

Any property right in this case based on the prior use of certain apparatus is subject to the further difficulty that, if it could be said to exist, it must be limited to the life of the particular equipment used. But station WMBB has been abandoned and the equipment which station WOK used when the Radio Act of 1927 was adopted has been replaced. (*Supra*, p. 7.) The facts, therefore, do not support a right based on the continued use of apparatus which was employed for broadcasting purposes prior to the enactment of the Radio Act of 1927.

II

REPLACING OLD APPARATUS WITH NEW PURSUANT TO A CONSTRUCTION PERMIT ISSUED UNDER THE RADIO ACT OF 1927 AND USE OF THE NEW EQUIPMENT UNDER LICENSES ISSUED UNDER THAT ACT DID NOT CREATE A PROPERTY RIGHT TO DISREGARD THE LICENSING PROVISIONS OF THE ACT

The second question certified asks whether the installation of new apparatus after the enactment of the Radio Act of 1927, pursuant to a permit obtained from the Federal Radio Commission, and the use of this apparatus under operating licenses from the Commission gave rise to a property right to continue broadcasting. Since the Act is explicit that the granting of a construction permit or operating license creates no such right, it seems to follow that the right could arise only if the licensing requirements of the Act are inherently unconstitutional even when applied to those who had not previously engaged in broadcasting.

Appellants' brief does not seem to contend that the licensing requirements of the Act are inherently unconstitutional. Their brief faintly suggests (p. 33) that it was arbitrary for the Commission to grant a construction permit, on the faith of which they invested in new apparatus, and to deny a year later renewal of their operating license. This result was a risk which, under the express terms of the Act, appellants assumed. Obviously regulation would be impossible if the Commission exhausted its power when it first granted a construction permit or issued an operating license. If new conditions arise, new facts are discovered, or a modification in the legislative policy is adopted, public interest, convenience, or necessity may require a different conclusion than the one reached earlier in acting upon a prior application for a license or construction permit. Even upon the same state of facts an executive officer may on reconsideration alter his previous decision. *Silberschein* v. *United States*, 266 U. S. 221, 224. In any event, appellants can not base their asserted property right on the authorizations obtained under the Radio Act of 1927 and at the same time attack its constitutionality. *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412.

The Act, as previously stated, negatives the creation of any right to continue broadcasting because of the prior granting of a construction permit or operating license. The granting of a construction permit gives no right even to an initial operating

license for the station so constructed. Section 21 of the Act (Gov. brief in No. 29, p. 60) provides that no operating license shall be issued for any station constructed after the Act takes effect unless the Federal Radio Commission has granted a permit for its construction. The section further provides that when a station for which a construction permit has been granted is completed, an operating license shall be issued, but only if nothing arising or coming to the Commissioner's knowledge after the construction permit was granted would, in its judgment, make the operation of the station against the public interest.

The Radio Act of 1927 also expressly provides that the granting of an operating license gives no right to operate beyond the terms of the license granted. Subparagraph (A) of Section 11 provides:

> (A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein.

The last paragraph of Section 5 provides:

> No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

The American Bond and Mortgage Company filed the waivers required by Section 5 and each license issued to it by the Commission included as a condition the provisions of Section 11, subparagraph (A). (*Supra*, pp. 11–12.)

III

DENIAL OF AN APPLICATION FOR RENEWAL OF A BROADCASTING LICENSE, PURSUANT TO THE REGULATORY PROVISIONS OF THE RADIO ACT OF 1927 AND OF THE AMENDATORY ACT OF MARCH 28, 1928, DOES NOT TAKE PROPERTY FOR THE PUBLIC USE OR WITHOUT DUE PROCESS

The sixth question certified presents the issue whether, on the assumption that appellants had a property right to continue broadcasting, the denial of an application for renewal of a broadcasting license, as authorized or required by the Radio Act of 1927, as amended, took their property for the public use, contrary to the Fifth Amendment. The fifth question certified presents the issue whether, on the same assumption as to a property right, the amendatory act of March 28, 1928 (known as the Davis Amendment), took their property for the public use or deprived them of property without due process, contrary to the Fifth Amendment.

We submit that the limited channels available for broadcasting, the excessive number of broadcasting stations operating when the Radio Act of 1927 was adopted, and the extremely complicated problems involved in allocating available broadcasting channels so as to utilize them as fully as

possible and so as to furnish all parts of the country and all communities with fair and efficient broadcasting service made it essential to confer upon the regulatory body created by Congress authority to deny an application for renewal of a broadcasting license. The provisions of the Radio Act of 1927 conferring such authority on the Federal Radio Commission are therefore reasonably adapted to regulation in the public interest of interstate broadcasting. An injury incidentally resulting from such a legitimate exercise of governmental power is not a taking of property for the public use or a taking without due process. We respectfully refer to the argument on this point in the Government's brief (pp. 31–46) filed with this Court in *White* v. *Johnson, supra.*

The American Bond and Mortgage Company did not exercise its statutory right of appeal from the order of the Commission denying its application for a renewal of its broadcasting license and the Commission's determination that the public interest, convenience, or necessity would not be served by granting the license is conclusive. Appellants in effect assert a constitutional right to obstruct interstate commerce. But this Court has held that an obstruction to interstate commerce, even though originally entirely lawful, can be removed not only without payment of compensation but at the expense of the owner. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 399–400. Moreover, the

powers of Congress are no more restricted by the Fifth Amendment than are the police powers of the States by the Fourteenth Amendment (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–157), and this Court has held that an ordinance may require a business lawfully carried on for many years at certain premises to move to an entirely different locality and to abandon its specially constructed buildings when growth of the city makes continuance of the business in the same location objectionable. *Reinman* v. *Little Rock*, 237 U. S. 171. Under the commerce clause a railroad may be required without compensation to abandon a business lawfully carried on for many years, namely, the transportation in interstate commerce of any article owned by it or by a company controlled by it. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. Acting under the commerce clause Congress may require an interstate pipe line which had previously transported only its own oil to give up its business or become a common carrier of oil. *The Pipe Line Cases*, 234 U. S. 548, 559–561.

Since the Radio Act of 1927 rests on the commerce clause and not on the police power, appellants' contention that broadcasting is essentially entertainment and that entertainment is not a business affected with a public interest (*Tyson & Brother* v. *Banton*, 273 U. S. 418) is irrelevant.

The Court of Appeals of the District of Columbia has sustained, against an attack under the Fifth Amendment, an order of the Commission refusing to renew the license of a broadcasting station which had been in operation since before the enactment of the Radio Act of 1927. *Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. (2d) 111, 113. Similar orders of the Commission were upheld by that court in *Carrell* v. *Federal Radio Commission*, 36 F. (2d) 117.

Appellants' principal contention seems to be that the provisions of Section 9 of the Radio Act of 1927, as amended by Section 5 of the Act of March 28, 1928, are so arbitrary and unreasonable as to amount to want of due process. This section, as amended, authorizes the Commission in granting or refusing licenses to bring about, whenever necessary or proper, equality of broadcasting service among the different zones established by Section 2 of the Act. Appellants do not contend that the particular geographical sections created by the zones are unreasonable; the attack is on the statutory provision that substantial equality of radio service throughout the United States should be a consideration in granting or refusing licenses.

The debates in Congress on the bill which became the Radio Act of 1927 show that prior to the passage of that Act broadcasting stations were very unequally distributed in different sections of the country and that they were unduly concentrated

about certain cities. When this bill was first presented to the House, Congressman White said (Cong. Rec., Vol. 67, pt. 5, p. 5479):

> Existing law gives the Secretary no control over the location of stations. The result has been an unjustifiable grouping of stations within limited areas. There are within 50 miles of Chicago 40 stations, of New York 38, of Philadelphia 22, and of San Francisco 22. Stations so centered detract from the value of each other and interfere with the highest quality of service.

When the conference report on the bill was presented to the House, Congressman Davis said (Cong. Rec., Vol. 68, pt. 3, p. 2575):

> There are now about 700 broadcasting licenses, as has been stated. About 600 of those are held in 21 States, chiefly in a few large cities. Seventy of these are in one State. * * *
>
> * * * Now to give you some conception—and this is not a sectional matter—I am insisting that there should be no discrimination against or in favor of any section, but when I figured them up not long ago, in the entire South and Southwest, constituting one-third of the geographical area and of the population of this country, there were 79 broadcasting stations, and there was not one first-class license in the whole lot, and is not to-day, south of the Ohio River.

The report of the House Merchant Marine and Fisheries Committee on the bill which became the

Act of March 28, 1928, shows that the broadcasting service of the third zone, based on the licensed stations located in that zone, was far inferior to that to which its relative population and area would entitle it. The report said (H. Rep. No. 800, 70th Cong., 1st Sess., p. 3):

> This third zone has a greater percentage of the population of the United States than either of the other zones and is second in area. It has, however, the smallest number of stations, with less power authorized to be used by them than any of the other zones.

The report (p. 3) contained a table which was said to represent the existing situation with substantial correctness. This table shows that whereas the population of each of the first four zones was between 24,000,000 and 25,000,000, the respective percentages of station power were as follows:

Zone 1	35.30
Zone 2	19.34
Zone 3	7.80
Zone 4	27.31

Equality of service is a fundamental principle of public utility regulation. Equality of service in broadcasting depends in large part upon a proper geographic distribution of operating stations. Such distribution is necessary to give equal reception to different parts of the country. Under average conditions during evening hours a station of 5,000 watts power has a radius of area of good service for the suburban dweller of approximately only 100 miles and a radius of area of fair service

for rural listeners of approximately only 1,000 miles.[1] We submit, furthermore, that Congress in regulating broadcasting from the national standpoint may recognize differences in sectional interests, both political, economic, and cultural. Equal broadcasting service means, therefore, both equal reception of programs and opportunity to satisfy sectional interests, and this equal broadcasting service can not be given unless broadcasting stations are distributed with approximate equality among the different zones. We submit that the provisions of Section 9, as amended, making such equality a consideration in granting or refusing broadcasting licenses are neither unreasonable nor arbitrary.

By General Order 40, dated August 30, 1928, the Commission designated 40 of the 90 available frequencies as cleared channels and allocated eight of these channels to each zone, and the Commission at the same time announced that these cleared channels would be assigned to stations with a minimum power of 5,000 watts and that only one station at a time would be permitted to operate on these channels during night hours. (Annual Report of Federal Radio Commission for the year ended June 30, 1928, pp. 48–50.) The frequency of 1,190 kcs., which the American Bond and Mortgage Company had been licensed to use since June,

[1] *United States* v. *American Bond and Mortgage Co.*, 31 F. (2d) 448, 453; Report of Committee on Radio Law (52nd Ann. Rep. Am. Bar Ass'n, p. 425).

1927, was assigned by this order to the third zone, and two Texas stations in that zone, WRR and WOAI, which had previously operated on other frequencies, have since November 11, 1928, divided time on this frequency, using each a power of 5,000 watts. (*Supra*, p. 9.)

Appellants' brief (p. 80) contends that what the Commission did in denying an application for renewal of a license for appellants' station was to transfer to two other stations a privilege previously enjoyed by appellants. We submit that this was neither the purpose nor the effect of the Commission's order. Station WOAI was licensed to operate full time with 5,000 watts power both on July 1, 1927, and June 30, 1928. (Annual report of Federal Radio Commission for the year ended June 30, 1928, pp. 59, 94). When appellants' station was denied a renewal of its license on August 31, 1928, and Station WOAI was licensed to use the frequency of 1,190 kcs., the latter obtained no additional privilege; the reallocation was for it merely a change in its authorized frequency. While station WRR was previously licensed to operate on only 500 watts power (*ibid.*, pp. 60, 95) the additional privilege which it obtained following the reallocation would seem to be attributable to the Commission's action in cutting down the full operating time of Station WOAI rather than to a transfer to it of part of the privileges previously enjoyed by appellants' station.

The Commission, having determined that public interest, convenience, or necessity would not be served by renewing the license of appellants' station and having assigned the frequency used by it to the third zone, must be assumed to have found that the elimination of one or more high powered stations outside of that zone was necessary and that among such stations appellants' was the least worthy or one of the least worthy. Since appellants did not take the appeal permitted by the Act but undertook to defy the Commission's order and the statute on the ground of unconstitutionality, the correctness of the Commission's decision upon the facts is not open in this proceeding.

It is not a violation of the Fifth Amendment for Congress, in the interest of satisfactory transportation service for the entire country, to group the railroads by regions for rate-making purposes and to permit the Interstate Commerce Commission to divide joint rates between the railroads of two regions on the basis, in part, of relative needs. *New England Divisions Cases,* 261 U. S. 184, 195–196. It would seem likewise permissible for Congress to provide that the limited available broadcasting facilities should be so distributed as to give all sections of the country approximately equal service.

IV

THE RADIO ACT OF 1927 IS NOT WANTING IN DUE PROCESS BECAUSE OF INDEFINITENESS IN THE STATUTORY STANDARD OF PUBLIC INTEREST, CONVENIENCE, OR NECESSITY OR BECAUSE THE ACT DID NOT REQUIRE THE COMMISSION FURTHER TO DEFINE THE ISSUES IN ADVANCE OF A HEARING BEFORE IT

The fourth question certified in this case is the same as the fifth question certified in *White* v. *Johnson, supra.* The only fact deemed relevant to the question of law thus raised is that appellants did not exercise the right of appeal given them by Section 16 of the Act from the order of the Commission denying an application for renewal of a license for their broadcasting station. We therefore refer to the argument on this point in the Government's brief (pp. 46–51) filed with this Court in *White* v. *Johnson, supra.*

V

IF APPELLANTS WERE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OR THEIR PROPERTY WAS TAKEN FOR THE PUBLIC USE, CONTRARY TO THE FIFTH AMENDMENT, ASIDE FROM THE WAIVERS SIGNED WITH RESPECT TO OPERATION OF APPELLANTS' STATION, THE GOVERNMENT DOES NOT CONTEND THAT THESE WAIVERS IMPARTED VALIDITY TO AN OTHERWISE UNCONSTITUTIONAL TAKING OF THEIR PROPERTY

If this Court answers in the negative the first and second questions certified by the Circuit Court of Appeals or if it answers in the negative the fifth and sixth questions certified, it is unnecessary to

answer the second question relating to the validity of certain waivers signed by the American Bond and Mortgage Company, as required by the Joint Resolution of Congress of December 8, 1926, c. 1, 44 Stat. 917, and by Section 5 of the Radio Act of 1927, nor the waiver incorporated in the licenses of American Bond and Mortgage Company, as required by subparagraph (A) of Section 11 of that Act.

If this Court answers in the affirmative either the first or second question and also answers in the affirmative either the fifth or sixth question, the Government sees no reason to believe that the waivers referred to in the second question would impart validity to an otherwise unconstitutional taking of appellants' property.

We submit that these waiver provisions have this significance: They indicate that Congress believed that the operation of a broadcasting station, whether before or after the enactment of the Radio Act of 1927, created no property right in the owner thereof which could be asserted against the plenary regulatory power of Congress. They also show that no rights were secured by procuring a replacement permit under the 1927 Act which were not subject to the exercise of administrative power under the Act. (*Supra*, pp. 18–21.)

CONCLUSION

It is respectfully submitted that the first and second questions certified should be answered in the negative. It is further respectfully submitted that if either the first or second question is answered in the affirmative, the fourth, fifth, and sixth questions certified should be answered in the negative.

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